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SJC-12162

RICARDO BARBOSA vs. COMMONWEALTH (NO. 1).

December 14, 2018.

Supreme Judicial Court, Superintendence of inferior courts.

Moot Question.

The petitioner, Ricardo Barbosa, appeals from a judgment of a single justice of this court dismissing his petition pursuant to G. L. c. 211, § 3. We affirm.

At the time Barbosa filed his petition, he stood indicted on charges of rape and of being a habitual offender. He argued that at an April 2016 hearing in the Superior Court, he had been "disallowed" to change his plea. According to Barbosa, the Commonwealth had offered him a "four year sentence," but then "renege" and raised the offer to a sentence of from five to seven years. Barbosa ultimately did not change his previously entered plea of not guilty. He filed his G. L. c. 211, § 3, petition in April 2016 asking this court to "allow" him to plead guilty in exchange for a four-year sentence. Meanwhile, while his petition was pending before the single justice, Barbosa was also pursuing an appeal to the full court from an earlier G. L. c. 211, § 3, petition, filed in September 2014, which had also been denied by a single justice. In the course of that appeal, both in papers filed with the court and at oral argument, Barbosa had raised the same issue that he raised in his April 2016 petition. On that basis, the single justice dismissed the April 2016 petition.

Barbosa filed a timely notice of appeal from that dismissal and, with leave of court, received an extension of time to file his brief. By the time he filed his brief, however, he had already been tried and convicted on the rape charge, and shortly

thereafter he was tried and convicted on the charge of being a habitual criminal. Because of the intervening trials and convictions, the G. L. c. 211, § 3, petition is now moot. Barbosa may of course present the issue raised in the petition -- the Commonwealth's alleged failure to honor a plea deal -- in his direct appeal from his convictions. That appeal is pending, awaiting assembly of the record. For reasons explained in Barbosa v. Commonwealth (No. 2), 481 Mass. (2018), also decided today, we have directed that that appeal be entered directly in this court once the record is assembled.

Judgment affirmed.

Ricardo Barbosa, pro se.
Michael McGee, Assistant District Attorney, for the Commonwealth.